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85-1397

Supreme Court, U.S.
FILED
FEB 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The Supreme Court of the United States

October Term, 1985

LOUIS VASQUEZ,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether in light of this Court's decision in *Reed v. Ross,* 104 S.Ct. 2901 [1984] and the decision by the New York State Court of Appeals in *People v. Class,* 63 NY 2nd 491 [1984] cert. granted __ US __ this Court has jurisdiction to review the Fourth Amendment issue in Point Two and reverse the defendants conviction?

2. Whether the motion to suppress two hand guns should have been granted because of the visual search and seizure of said guns was in violation of petitioner's Fourth Amendment rights under the United States Constitution?

There is no change in counsel for the petitioner or for the respondent.

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OPINION IN THE COURT BELOW

The Order of the Court of Appeals of the State of New York, which gives the reasons for the unanimous affirmance of the Judgment of conviction, is set forth in the appendix at page .

GROUNDS FOR JURISDICTION OF THIS COURT

The Judgment of the Supreme Court of the State of New York, County of New York, [Katz, J.], was rendered on April 26, 1983 convicting petitioner, after a plea of guilty, of two counts of criminal possession of a weapon in the third degree [P.L. §265.02] and sentencing him to five years probation.

On appeal to the Appellate Division, First Department the petitioner argued that the suppression court committed a constitutional error of law by not considering the police officers intrusion, sticking his head in the car window thereby enabling him to conduct a visual search of the car interior and by so doing he was able to view the hidden object between the passengers legs.

It was also argued that the court erroneously turned this constitutional invasion of privacy into a "open view observation."

After oral argument before the justices of the Appellate Division the Court of Appeals of the State of New York rendered a decision in *People v. Class,* 63 N.Y. 2nd 491 (1984). Thereafter the appellate court justices without ordering additional arguments on their own considered petitioners constitutional arguments in light of *People v. Class, supra.*

On December 20, 1984 the Appellate Division affirmed the conviction in a memorandum and order, with Justices Fein and Murphy dissenting (106 A.D. 2nd 327) [1st Dept. 1984]. The majority of the justices notwithstanding *Class, supra,* were of the opinion that *People v. David L.,* 56 NY 2nd 698 [1982] required the affirmance of petitioners conviction. On February 19, 1985 the Honorable Francis T. Murphy, presiding Justice of the Appellate Division, Supreme Court, First Department, issued an order granting leave to petitioner to appeal to the Court of Appeals. On December 17, 1985 the Court of Appeals, in an unreported memorandum-order unanimously affirmed the judgment of conviction. The Court of Appeals was of the opinion that the petitioner's failure to preserve his constitutional argument by specifically placing it for disposition before the suppres-

sion court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the IV Amendment of the United States Constitution. This is set forth in the Appendix at page

STATEMENT OF FACTS

On February 16, 1983 at the Supreme Court of the State of New York, New York County (Katz, J.S.C.) a Mapp hearing was conducted to suppress the tangible evidence at the time of the arrest of defendant-appellant Luis Vasquez and the then deceased co-defendant Mario Cabollaro.

Dennis Herlihy, a New York City Police Officer, 34th Precinct, testified that on September 28, 1981 while driving a radio motor patrol car with his fellow Police Officer Gorman seated in the passenger side, at approximately 11:30 in the morning at 183rd Street and Broadway, he observed a car going in the opposite direction from his car. The vehicle proceeding south on Broadway had a license plate hanging on a string or rope (7).*

The observed car bore a New Jersey license plate. The police officer made a U-turn and noticed the vehicle in question had already double parked and the defendant, as the driver, exited therefrom, while the co-defendant Mario Cabollaro remained seated in the passenger side (7-9).

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*Denotes the page numbers of the stenographer's Mapp hearing minutes.

When the defendant exited the car, he started to walk toward the sidewalk and Officer Herlihy approached him and asked for his license and registration, which were produced. Upon examination of these documents, one had the name Luis Vasquez on a New York State driver's license while the registration was under the name of Conrad Pons (10-13). The officer checked the registration card with the car and they matched (14, 15).

The defendant told him that even though the driver's license and the registration bore different names, he was one and the same person and was the owner of the car in question (15). The police officer said the next thing he did was to approach the person seated in the passenger side of the car and asked him, "Who is the owner of the car?" The passenger responded by saying that he didn't speak English. The police officer then put his head into the car and asked the passenger again, "Who is the owner of the car?" and received a reply, "No speak English."

While the police officer had his head in the car, he looked around and saw something between the passenger's legs on the car floor. "It was a metal object, appeared to be a pistol." Upon making this observation he opened the door "reached down, reached in, pulled out the pistol." (16). He said that he arrested Mario Cabollaro and took him to the police station in a police radio car. Police Officer Gorman drove the defendant's car to the police station but Police Officer Herlihy said it was he who searched the car and found another gun in a paper bag in the rear of the car behind the passenger's side (17-18).

The two guns were submitted as People's Exhibits Two and Three for identification (12), Police Officer Herlihy's memo book having been deemed Exhibit One for identification (12). A brown paper bag was also sub-

mitted as People's Exhibit for identification and after Police Officer Herlihy identified the two guns with bullets and the paper bag, they submitted in as evidence Two, Three and Four respectively (19-22).

On cross examination Police Officer Herlihy said that on the date and time in question he was in uniform and on RMP with Police Officer Gorman as his passenger. While traveling north on Broadway, a four lane street, he noted a car going south with a front hanging license plate. He observed the car stop between 183rd and 184th Streets and Broadway. He testified that he made a U-turn at 183rd and 184th Streets and parked his car in front of the defendant's car. The defendant's car was double parked and according to the police officer it was not unusual to see cars double parked (22-25). He said the driver Vasquez was already out of the car, walking towards the sidewalk, when he approached him and asked for his license and registration (25). The police officer said the conversation with the defendant Vasquez lasted about two minutes and during this conversation his back and his fellow officer's back were to the passenger in the car (16, 27, 29). He claimed that he went to the passenger and inquired of him as to who owned the car and received a "no speak English" reply. The police officer not satisfied with the answer actually put his head inside the car and asked the same question and received the same answer. During this intrusion the police officer was looking around and saw what appeared to be an object on the car floor between the passenger's legs (27-29). The police officer said he saw something on the car floor. Then he said it was an object on the floor. When pressed for an answer as to whether he knew that the object he saw was a gun he replied, "No Sir." (27, 29-30). He said he opened the car door and reached in between the passenger's legs and pulled out a gun. He took the passenger out of the car and searched

and arrested him. He also searched and arrested the defendant Vasquez but found no incriminating evidence. He also said he did not issue any traffic violation to the defendant Vasquez (30-31, 34). Nor, did he advise the two defendants of their rights after the arrest (32). Police Officer Herlihy drove the two defendants to the police station in his RMP while Police Officer Gorman drove defendant Vasquez' car to the police station. He said he put the two defendants in a keeplock cell, went outside and saw Police Officer Gorman drive in. Police Officer Gorman went inside the police station while Police Officer Herlihy proceeded to search Vasquez' car and found another gun in a paper bag (30-38).

When the hearing terminated, counsel for the defendant Vasquez made an oral application for the court to reinspect the Grand Jury minutes upon the grounds that the present hearing testimony brought to light that there was insufficient evidence to warrant an indictment. Counsel brought to the court's attention that in *People v. Joseph,* 93 Misc 2d 267, Judge Leo Molinas dismissed an indictment because one of the defendants (Concepcion) was not present in the car where the other defendants were, when upon a search a gun was found. There were no facts to connect Concepcion with the gun except for the admission that the car was his (44-45). The prosecutor opposed the motion arguing that in April 1982, Judge Dontzin, after inspecting the Grand Jury minutes, found sufficient evidence. The prosecutor further argued that the present Judge lacked power to overrule Judge Dontzin of concurrent jurisdiction (46, 47). The court denied the motion and ruled "Application denied." "There is no basis for this court based on the evidence adduced at this hearing to reinspect the Grand Jury minutes as to its sufficiency. That was done by a very able Judge, Judge Dontzin, and that is the law of the case, and accordingly, your application is denied." (47)

COURT'S DECISION

The court denied the motion to suppress and is fully set out in appellant's record on appeal at pp. 61-65 and in the Appendix of this Brief at pp.

SENTENCE

The defendant Vasquez was sentenced to five years probation in this manner at pp. 8-9 of the Minutes of Sentence.

> "However, with regard to the sentence, the sentence of this court, is as I promised at the time the plea was taken, to sentence Mr. Vasquez to probation for a five year period, the terms and conditions of those with the probation will be given to Mr. Vasquez by the Probation Department."

The court, after advising the defendant Vasquez of the consequences of committing a felony within the next ten years, without stating the full probation condition went on to say, "And further, if you should violate any of the terms given to you by the Probation Department for their supervision, you will again be facing serious sanctions on the part of this court." At p. 9. Prior to sentence in stating mitigating circumstances of punishment, the court said at p. 8, "Also, the probation report states in view of the fact that the co-defendant, since deceased, admitted ownership of both guns, it appears that mitigating circumstances are involved and I concur with the probation report in that area."

The opinions of the majority and dissenting Judges of the Appellate Division, First Department, appear in the Appendix of this Brief at pp. 4a-23a.

The order of Judge Murphy granting leave to appeal to the Court of Appeals is located in the appendix at page 1a.

POINT ONE

THIS COURT HAS JURISDICTION TO REVIEW THE FOURTH AMENDMENT ISSUE IN POINT TWO AND REVERSE THE PETITIONER'S CONVICTION.

We contend that the Court of Appeals order of affirmance of the Appellate Division's order and ruling that the "defendant's failure to preserve his present argument, by specifically placing it for disposition before the suppression court, leaves no basis for our review" runs fly in the face of this courts ruling in *Reed v. Ross,* 104 S.Ct. 2901, __U.S.__ (1984).

In *Ross, supra,* in a Habeas Corpus relief set forth a "cause and actual prejudice requirement" where a procedural default bars litigation of a constitutional claim in state court.

Since petitioner's case suffers from the same fate that *Ross* suffered because of procedural default, we believe we must meet the "cause and actual prejudice requirement" for this Court will assume jurisdiction to review our constitutional violation claim where a police officer conducted a visual search of petitioner's car by puting his head into the car window and saw an outline of a gun under the passenger's seat.

Probable cause has been held to be mixed facts and law. On the facts the suppression hearing Court found

> "Officer Herlihy then approached the car and asked Mario Cabalarro who was seated in the front passenger seat 'whose car it was." Mr. Caballarro responded that he did not speak English. Officer Herlihy then leaned into the car through an open window and repeated the question and

while leaning into the car he noticed a metallic object which appeared to be a pistol on the floor of the car between Mr. Cabalarro's feet. Officer Herlihy opened the car door and pulled out that object. That object was in fact a hand gun." Suppression Court decision at p. 673.

In respect to it's conclusion of law in the aforesaid facts the Court went on to rule after stating the hanging front license plate and double auto parking were both violations of the vehicle and traffic law said as follows:

"When the defendant, Mr. Vasquez, produced a license and registration, bearing different names and addresses and told the officer that he, the driver, owned the car, police officer's suspicion were further raised. Clearly, this gave rise to sufficient cause to make further inquiry of Mr. Cabalarro, the passenger in the vehicle. *People v. Sobotker,* 43 NY 2d 559 that reasonable suspicion is the quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe that criminal activity is at end. The first object recovered, People's Exhibit 2, *was in open view* on the floor of the car and appeared to be a pistol. Under the circumstances officer Herlihy's opening the car door and reaching in to retrieve the object *was a minimal intrusion reasonable in every respect.* The recovery of the second pistol, People's Exhibit Three was made pursuant to an invatory search incident to arrest" (Decision at pp. 64-65)

On December 17, 1985 from the appeal from the affirmance of the Appellate Division (*People v. Louis Vasquez,* 106 AD 2d 327 (1st Dept. 1984)). The Court of Appeals in an amazing ruling (not reported) said:

"While defendant on this appeal complains that the police officer, by leaning into the car through an open window, violated his Fourth Amendment rights. The question presented to the suppression court, and ruled on by that court, was whether defendant's rights were violated by the

officer's opening of the car door and reaching into the automobile to recover a weapon. Defendant's failure to preserve his present argument, by specifically placing it for disposition before the suppression court, leaves no basis for our review."

In petitioner's brief to the Appellate Division, First Department it was urged that the suppression court committed a constitutional error of law by failing to consider the police officers visual intrusion facilitate by his placing his head inside the car window thereby enabling him to view the hidden object between the passenger, co-defendant Mario Caballaro's legs.

It was also argued that the suppression court erroneously turns this constitutional invasion of privacy into an open view observation.

After oral argument before the appellate court where the appeal was in reserve decision the Court of Appeals handed down an opinion in *People v. Class,* 63 N.Y. 2nd 491, [1985].

With *Class, supra,* the five judges of the Appellate Court made their decision. Three of the Justices were of the opinion that *Class, supra,* was not applicable. The two dissenting Justices argued that the petitioner's constitutional rights under the IV Amendment were violated and they considered *People v. Class.*

The Court of Appeals in *People v. Class, supra,* for the first time has ruled "*** There are many places inside a car—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The governmental intrusion herein, Officer McManee's opening the door and reaching inside, was undertaken to obtain information and it exposed these

hidden areas. It therefore constituted a search. [Cf. *U.S. v. Place,* 462 U.S. 696; *People v. Miller,* 43 NY 2nd 789 afg 52 A.D. 2nd 422-5, 428; *People v. Sullivan,* 29 N.Y. 2d 69]"

Addressing the above paragraph the Court of Appeals said in footnote 2 "although the gun was protruding from underneath the seat, Officer McNamee first observed it while conducting the search. The only question, then, is whether the officer had a right to be in the position from which he made his observation."

There is no question that petitioner's counsel raised a similar theory of law and it was rejected by the suppression court.

This court in *Reed v. Ross,* 104 S.Ct. 2904 [1984] at page 2909 "on the other hand, the cause requirement may be satisfied under certain circumstances when procedural failure is not attributable to an intentional decision by counsel made in pursuit of his clients interest. The failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met."

This Court, in *Reed, supra,* at pages 2909-2910 "if counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment what is meant by "reasonable basis," see *infra,* at it is safe to assume that he is sufficiently unaware of the questions latent existence that we cannot attribute to him strategic motives of any sort."

Still the court said in *Reed, supra,* at page 2910 "counsel's failure to raise a claim for which there is no reasonable basis in existing law does not seriously im-

plicate any of the concerns that might otherwise require deference to a State's procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others."

The police officer's action and conduct in the petitioner's case when he approached the passenger in the car demonstrated his undeviating intent without any basis to make wholesale entry into the car; or nothing more than a hope that the petitioner did not own the vehicle or that it might turn out to be stolen.

Under the facts and law of this case there was that "cause and prejudice" that this Court should assume jurisdiction and reverse the conviction.

POINT TWO

WHEN THE POLICE OFFICER PLACED HIS HEAD INTO THE CAR WINDOW TO QUESTION THE PASSENGER AND MADE A VISUAL SEARCH THEREIN, HE INVADED THE OWNER'S CONSTITUTIONAL RIGHT OF PRIVACY AND THE SEARCH AND SEIZURE OF CONTRABAND FLOWING FROM THIS, UNLAWFULLY VIOLATED THE PETITIONER'S FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION. THE COURTS BELOW COMMITTED AN ERROR OF LAW.

Police Officer Dennis Herlihy driving a police radio car with his partner Police Officer Gorman, at approximately 183rd Street and Broadway in New York County on September 28, 1981 at about 11:30 in the morning, while going northbound on a four lane street noted the defendant Luis Vasquez' car going southbound with a front hanging license plate. While making a U turn on 183rd Street and Broadway he observed that the car had stopped in a double parked position. Vasquez had gone out of the car on 183rd Street and Broadway and was walking towards the sidewalk when Police Officer Herlihy stopped him and asked for his license and registration (6, 7, 10). Because the car bore a New Jersey license plate that was hanging by a cord and was double parked (8) would probably require a motor vehicle violation summons or ticket but the police officers did not issue any (34).

Police Officer Herlihy, notwithstanding his failure to issue any summons, was particularly interested in the fact that the New Jersey registration bore the name Conrad Pons while the driver's license had the name Luis Vasquez

and was not satisfied when Vasquez said he not only was the owner of the car but he also used the names of Vasquez and Pons (10-15).

After conversing with Vasquez for over two minutes, with his back to the passenger sitting in the car (27) Police Officer Herlihy approached the car and upon his personal investigation, compared the registration with the car and discovered they matched (15). He then inquired of the passenger, "Who is the owner of the car?" He said the passenger told him he didn't speak English (16).

Not satisfied that Vasquez said he owned the car and that the registration given to him by Vasquez matched with the car (15) and haing been told by the passenger that he didn't speak English (16) the police officer now places his head into the car passenger's window and again asks who owns the car and again gets a negative reply, "No speak English." (16).

In this point in time the police officer never told anyone that he was in fear of his or his fellow officer's life or that they were in any danger. At best the police officer could have issued a motor vehicle violation but he already told the court he didn't issue any (34).

We claim here that when the police officer placed his head into the car window he invaded the privacy of the car owner Vasquez and violated the petitioner's constitutional rights of the Fourth Amendment to the United States Constitution. With all the law cited in *Massachusetts v. Podgurski,* 386 Mass. 385 (1982) cert. denied __ US __, 103 S.Ct. 1167 (1983); *People v. Class,* 63 NY 2d 491 (1984) cert. granted __ US __; *People v. Vidal,* 71 AD 2d 962 (2nd Dept. 1979) and the dissenting opinion of petitioner's case in *People v. Louis Vasquez,* 106 AD 2d 327

(1st Dept. 1984) the motion to suppress should have been granted.

It is interesting to note that this Court denied certiorari in *Podgurski, supra,* but Mr. Justice dissenting opinion in reciting the crucial facts is almost on all four corners of petitioner's facts and law where the police officer stuck his head in the car window and conducted a visual search.

Judge Rehnquist said at p. 1167,

> "This case began when the manager of a clothing store in Canton Center, Massachusetts, observed an unfamiliar blue Van in the rear parking lot, which the store owned. From his vantage point fifteen feet away, the manager saw two men in the Van cutting up a suspicious looking substance. The Canton Police Department dispatched Officer Brown to 'check two men inside a Van acting suspicious.' *** When the police approached within about ten feet of the Van, he noticed two people in the rear of the Van and that the sliding door on the passenger side stood approximately eighteen inches ajar. *Officer Brown then stuck his head through the door.* He observed respondents Podgurski and Collins cutting hashish. Respondents were arrested and the hashish seized." Underlines supplied.

Mr. Justice Rehnquist noted that the Massachusetts Court said

> "It also thought that there would be no constitutional problem if Officer Brown had looked through the window or one of the windows, had kept his head outside the open door. id, 386 Mass. at 388." At p. 1167 of *Podgurski, supra.*

Police Officer Herlihy said when he leaned his head through the car window and got a negative answer, "No

speak English" "*** I looked around the car and I saw something on the floor of the car." He said, "It was a metal object, appeared to be a pistol" "on the floor between the passenger's legs." (16).

On cross examination when the question put to Police Officer Herlihy about the gun, this was said,

Q. At that time you stated that you observed a gun?

A. There was something on the floor, yes.

Q. Well, what do you mean by something?

A. It turned out to be the gun, yes sir.

Q. Well, what did you see first?

A. Saw an object down on the floor.

Q. And then what did you do?

A. I opened the door. I reached between Mr. Vasquez' legs to get the gun.

Q. Well, let me ask you a question, officer. At the time you saw this object did you know it was a gun?

A. No sir.

Q. But, you opened the door and then what did you do?

A. I reached in to between Vasquez' legs—I mean the passenger.

Q. Then you took the passenger out?

A. Yes.

Q. What did you do to the passenger after that?

A. Searched him. Search him.

Q. Fine. Anything else on him?

A. No sir. (29, 30).

By this line of questioning for all intent and purpose it appeared that the police officer did not see anything that looked like a gun. He characterized what he saw as an

"object" that turned out to be a gun (29, 30). But on direct examination he characterized what he saw as "a metal object, appeared to be a pistol." (16)

The court in its opinion chose to believe the direct examination testimony of Police Officer Herlihy but committed error of law by not considering that Police Officer Herlihy's intrusion by sticking his head in the car and that only by doing so was he able to see the object between the passenger's legs. The court erroneously turns this constitutional invasion of privacy into an open view observation (64, 68).

The most troublesome aspect of the majority opinion in *Vasquez, supra,* is the manner by which they cite *People v. Class,* 63 NY 2d 25 (1985) at p. 10 whereat it was said "As the Court of Appeals has recently stated:"

> "One has no legitimate expectation of privacy in locations in a car which are observable by passersby. Accordingly, an officer's *simply peering inside an automobile* does not constitute a search and the Fourth Amendment consequently does not limit this activity."

But they studiously fail to continue and consider the rest of the same paragraph that this court of appeals has mandated the law to be which is as follows:

> including the area underneath the seats—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The government intrusion here, Officer McNamee's opening the door and reaching inside was undertaken to obtain information and it exposed these hidden areas. It therefore constituted a search."

The majority opinion relies upon *People v. David L.,* 56 NY2d 698 reversed *Vidal, supra,* to affirm the defen-

dant's conviction. We submit that their theory of law is not only misplaced. Because in *Class, supra,* the Court of Appeals distinguished *David L., supra* from *Class, supra* when it said, "The facts reveal no reason for the officer to suspect other criminal activity or to act to protect his own safety. (Compare *People v. David L.*, 56 NY2d 698, Cert. 459 US 866)."

Thus, when the majority opinion erroneously stated that *David L., supra* reversed *People v. Vidal,* 71 AD2d 982 and the Court of Appeals distinguished *David L., supra* in *Class, supra,* we submit that the denial of the motion to suppress in our case cannot stand the test of constitutional scrutiny in this Court.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

ROSENBLOOM & CANONICO
Attorneys for Appellant
31 Smith Street
Brooklyn, NY

APPENDIX A—OPINION OF THE NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

No. 671
The People &c.,

Respondent,

v.

Louis Vasquez,

Appellant.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

The order of the Appellate Division should be affirmed.

While defendant on this appeal complains that the police officer, by leaning into the car through an open window, violated his Fourth Amendment rights, the question presented to the suppression court, and ruled on by that court, was whether defendant's rights were violated by the officer's opening of the car door and reaching into the automobile to recover a weapon. Defendant's failure to preserve his present argument, by specifically placing it for disposition before the suppression court, leaves no basis for our review. Defendant's alternative contention, that he should not have been charged with possession of the guns because he was outside the car when they were found, has been waived by his guilty plea.

***

Order affirmed in a memorandum. Chief Judge Wachtler

and Judges Jasen, Meyer, Simons, Kaye, Alexander and Titone concur.

Decided December 17, 1985

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

No. 671
The People &c.,

Respondent,

v.

Louis Vasquez,

Appellant.

The appellant(s) in the above entitled appeal appeared by Rosenbloom and Canonica, Esqs. and Joseph Ostrowsky; the respondent appeared by Hon. Robert M. Morgenthau, District Attorney, New York County.

The Court, after due deliberation, orders and adjudges that the order is affirmed in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye, Alexander and Titone concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Donald M. Sheraw
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 17, 1985

APPENDIX B—OPINIONS OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1984

Present—Hon. Francis T. Murphy, Presiding Justice
Theodore R. Kupferman
Sidney H. Asch
Samuel J. Silverman
Arnold L. Fein, Justices.

The People of the State of New York,
Respondent,

-against-

Louis Vasquez,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Solomon Katz, J.), rendered on April 26, 1983, convicting defendant of criminal possession of a weapon in the third degree,

And said appeal having been argued by Bernard Rosenbloom of counsel for appellant, and by Laurie E. Cohen of counsel for respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is ordered that the judgment so appealed from be and the same hereby is affirmed. [Murphy, P.J. and Fein, J., dissent in a memorandum by Fein, J.]

ENTER:
JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Murphy, P.J., Kuperferman, Asch, Silverman, Fein, JJ.
20509

The People of the State of New York,
Respondent,

-against-

Louis Vasquez,
Defendant-Appellant.

Judgment of the Supreme Court, New York County (S. Katz, J.), rendered April 26, 1983, convicting defendant upon his plea of guilty, of two counts of criminal possession of a weapon in the third degree, and sentencing him to five years probation, is affirmed.

On September 28, 1981, police officers on radio motor patrol in upper Manhattan noticed an automobile which was being driven by defendant, with a New Jersey license plate attached only by a string. One of the police officers, Herlihy, testified that this mode of license attachment was frequently used on stolen cars. In addition to the driver, there was one passenger, sharing the front seat. The police made a U-turn to follow the car.

Meanwhile, defendant had double-parked and exited the vehicle when the police approached him and asked to see his driver's license and registration. Defendant handed Officer Herlihy a New York driver's license in the name of Louis Vasquez, with a Manhattan address. He also gave the officer a New Jersey registration which matched the

license plates, in the name of Conrad Pons, with a Union City, New Jersey, address for that individual. Officer Herlihy then asked the defendant driver who the owner of the car was. Defendant replied that he, himself, was the owner, i.e., Conrad Pons with a New Jersey address, although he was driving with an operator's license as Louis Vasquez, with an address in New York. The officer than went over to the passenger still sitting in the car and asked *him* who owned the car. The passenger replied that he did not speak English. The officer leaned into the open window and asked against if the passenger knew who owned the car. As he did so, he saw a metal object which appeared to be a pistol on the floor between the passenger's legs. Officer Herlihy opened the door, reached in and pulled out a loaded automatic pistol. After the defendant and the passenger had been arrested, an inventory search of the automobile revealed the presence of another loaded automatic pistol.

Defendant was indicted along with his passenger on two counts of criminal possession of a weapon in the third degree. After hearing, the Court denied defendant's motion to suppress the seized weapons. Defendant pled guilty to both counts of the indictment and was sentenced as noted above.

Defendant, and the dissent, contend that the hearing court should have suppressed both guns as the product of an illegal search and seizure. We disagree. We also disagree with the dissent's conclusion that Officer Herlihy violated the rights of the owner and driver of the car by an "intrusion [consisting] of a search of the interior of the vehicle, albeit visual."

The dissent concedes that the police stop of the vehicle and the requirement that defendant produce his

driver's license and the auto registration was proper in light of the dangling New Jersey license plate. Moreover, the dissent also acknowledges that further inquiry was appropriate in view of the discrepancy between the names on the license and registration (as mentioned *supra*, there were also different addresses, in two separate states) including the right to make inquiry of the passenger as to his knowledge of the ownership of the vehicle.

Much of the testimony of Officer Herlihy is set out at length in the dissent and hence need not be repeated. However, examination of some of that testimony, in context, is instructive. Thus, although Officer Herlihy testified he "leaned into the car" and spoke to the passenger and again got a negative answer, he continues "and I looked around the car and I saw something on the floor of the car." On cross-examination, Officer Herlihy gave his reason for leaning into the *open* car window when he questioned the passenger. Defense counsel then asked whether the officer leaned into the car and asked the passenger a second time who was the owner of the car. After the officer responded "yes" the counsel asked "What you feel he couldn't hear you?" and was answered "Well, sometimes, yes, maybe he didn't." Counsel then asked in obvious sarcasm, "Maybe your English would be a little clearer if you leaned into the car?" and the officer responded "Possibly he might have picked up some omre [sic-more] words or something." Thus, the testimony showed that the officer leaned into the car simply in an attempt to better have himself understood by the passenger. When he did so, he certainly was not obligated to place his hands over his eyes or not view what was in plain sight.

The case of *People v. David L.*, 56 NY2d 698, *revg on dissent* of Hopkins, JP. and Weinstein, J., 81 AD2d 893, is directly in point. The dissent herein notes that in *David*

L. the Appellate Division dissenters, whose opinion was adopted by the Court of Appeals, ruled that the passenger had no possessory rights in the car while, in this case, we deal with the rights of the owner and driver. However, in *David L.*, the dissenters gave this lack of a possessory right by the passenger only as an *additional* reason for affirming the conviction (*People v. David L.*, 81 AD2d 893, 896). The main thrust of their decision was that the police had the right to open the door of a car, lawfully stopped by them, to decrease the risk of injury to them.

The defendant and the dissent herein rely upon *People v. Vidal,* 71 AD2d 982, to support the conclusion that since there was no evidence of any danger to the police, the act of leaning inside and conducting a visual search was without justification.

However, the Court of Appeals in adopting the dissent in the *David L.* case has in effect reversed the decision in *Vidal.* True, in *David L.*, the Appellate Division majority, expressly relying upon *Vidal,* held that although an officer who lawfully stops a driver for a traffic offense may order the driver to step out of the car, the officer *may not, in the absence of any independent evidence of criminality or danger to himself,* take the additional step of opening the doors of the vehicle to look inside. (81 AD2d 893). The dissent adopted by the Court of Appeals, rejecting this reasoning, stated in pertinent part:

> The narrow question before us is whether a police officer may open the door to a motor vehicle during the course of an investigation following the legal stop of the vehicle for good cause—here a defective tail light and excessive noise. We think that to hold the police may not so behave, under the circumstances here, imposes an unreasonable and unduly onerous burden on the legitimate activities of law enforcement agents. . . . In determining the

> unreasonableness of a search and seizure the total circumstances must be considered. Here the defendant was seated in an automobile lawfully stopped by the police while it was proceeding on a public highway. The United States Supreme Court has lately recognized the inordinate danger to a police officer as he approaches a person seated in an automobile (*Pennsylvania v. Mimms,* 434 US 106, 110). The statistics of police homicides indicate, as the Supreme Court pointed out in *Mimms,* that (p 110) " 'a significant percentage of murders of police officers occurs when the officers are making traffic stops' " (*People v. Troiano,* 35 NY2d 476, 478, 482 [concurring opn of Rabin, J.]). The opening of the door of the car lessens to a substantial degree the risk of injury to the officer from the use of a gun by a passenger. It cannot be said, therefore, that the "search", i.e., the mere opening of the door, was unreasonable.

(81 AD2d at 894).

It is now settled New York law that a valid investigative stop of a car may be accompanied, as a protective measure, by the opening of the door and a directive from the police to the occupants to exit the car (see *People v. Rosario,* 94 AD2d 329).

The actions of Officer Herlihy herein were much less intrusive. He did not open the door of the automobile, nor was his purpose, according to the testimony, to make a search. Even if we assume, *arguendo,* that he did in fact lean in the car window solely to make a visual search, he had every right to do so since he had the right to open the car door and order the passenger out (*People v. David L., supra; People v. Rosario, supra*). The statement in the dissent which relies on the ground that there was no evidence that the officer was in danger, misses the mark. The record does not show any question put to the officer either by the

People or defense counsel as to whether he "felt" himself to be in danger. The courts have held, and rightly so, that *every* stop of an automobile may pose potential danger, as an objective matter, to a police officer, regardless of how he may perceive the situation (see *Pennsylvania v. Mimms,* 434 US 106, 110; *People v. David L., supra; People v. Livigni,* 88 AD2d 386, *affd* 58 NY2d 894; *People v. Rosario, supra*). Therefore, for Officer Herlihy to "lean" into the car window as he spoke to the passenger and more closely observe the passenger, his movements and immediate surroundings, was, even accepting the dissent's interpretation of the officer's actions, a reasonable precautionary step on the officer's part. It was also much less intrusive than ordering the door opened and the passenger to step out, as the officer had every right to do, without any overt act on the part of the driver or passenger or specific fear on the part of the officer (*People v. David L., supra; Pennsylvania v. Mimms, supra*).

Commonwealth v. Podgurski, 386 Mass 385, 436 NE2d 150, *cert den* __ US __, 103 S Ct 1167, cited by defendant and the dissent, is inapposite. There, evidence was suppressed where a police officer thrust his head into the open side door of a van, enabling him to observe areas not visible from the outside. The Massachusetts Court had delineated areas of a vehicle in which there is a legitimate expectation of privacy, noting those areas are free from observation except by "physical intrusion" of some sort and typically include the glove compartment, trunk, closed containers in the interior and other areas not in plain view (436 NE2d at 153). The Court included the back of a "windowless van" in this category. In the instant case, however, the firearm was observed on the front seat floor, an area in plain view from the outside of the vehicle. In addition, in *Podgurski,* the Court noted that the officer had not observed any improper activity *until* he stuck his head

inside the van and made it clear that had he observed any suspicious activity, he would have been entitled to look inside the van (436 NE2d at 152). In the instant case, Officer Herlihy observed the license plate hanging by a string and the defendant's driver's license and the auto registration made out to different persons at different addresses, while defendant claimed he was the owner of the vehicle. In view of this suspicious behavior, the police would have been justified in stopping the vehicle, ordering the occupants out and opening the car doors, in which case the gun on the floor of the front seat would have been in plain view. But they did not go so far. Under the circumstances here presented, leaning in an open window to speak to the passenger and observing the gun in plain view was far less intrusive and hence not violative of defendant's rights.

As the Court of Appeals has recently stated: "One has no legitimate expectation of privacy in locations in a car which are observable by passersby. Accordingly, an officer's *simply peering inside an automobile* does not constitute a search and the Fourth Amendment consequently does not limit this activity [citations omitted]" (*People v. Benigno Class,* __ NY2d __, decided Nov. 27, 1984, NYLJ, Dec. 3, 1984, p 1 col 1, emphasis added).

All concur except Murphy, P.J. and Fein, J. who dissent in a memorandum by Fein, J. as follows:

Defendant appeals from a judgment, Supreme Court, New York County (Katz, J.), rendered April 26, 1983 convicting him upon his guilty plea of two counts of criminal possession of a weapon in the third degree, and sentencing him to five years probation. The appeal brings up for review the denial after a hearing of the defendant's motion to suppress.

The judgment should be reversed on the law, the motion granted, the indictment dismissed and the case remanded to Criminal Term for the purpose of entry of an order in its discretion, pursuant to CPL 160.50.

On the morning of September 28, 1981, Police Officers Gorman and Herlihy, while on patrol in a radio car in Manhattan, observed a vehicle with New Jersey license plates traveling south on Broadway near 183rd Street. The front license plate was affixed to the car with a rope. The officers made a U turn and followed the car, which by then had double parked. Defendant driver emerged from the vehicle and walked toward the sidewalk, while the passenger, co-defendant Cabollaro, remained inside. Officer Herlihy approached the defendant and asked to see his driver's license and car registration. Defendant produced a New York driver's license in the name of Louis Vasquez and a New Jersey registration for the vehicle, which identified the owner as Conrad Pons. The registration displayed to the officer matched the license plate on the car.

The officer was questioned concerning any inquiry he made to the driver.

"Q: Now, did you have any conversation with the defendant with respect to his—the driver's license and registration card you [sic] displayed?

A: I did, sir. Yes.

Q: What was that?

A: I asked him who the owner of the car was.

Q: Did he reply?

A: If I recall, he said he was the owner.

Q: Now, what did you do next?

A: I—then I walked a little further up to the passenger car and I spoke to the passenger."

On cross examination, the officer testified as follows:

"A: I asked him for his license and registration.
Q: You said nothing before that?
A: I don't recall, sir.
Q: And at that time where was he standing?
A: Well, just at the sidewalk, just on the sidewalk.

***

Q: And he gave you a license and registration?
A: Yes, sir.
Q: Now, when he gave you this license and registration you saw a different name on the registration and a different name on the license; is that correct?
A: Yes, sir.

***

Q: All right. At that time when you saw this different license and registration did you go over to your police car to see if the car was on the stolen list?
A: No, sir.

***

Q: Now, you asked the driver who owned the car; is that correct?
A: Yeah.
Q: And he said he did?
A: Yes.
Q: And you didn't go over to your rmp to check to see if it was on the stolen list?
A: Yes.
Q: You then went to the car to ask the passenger who owned the car?
A: Yes."

The officer had previously testified on direct:

A: I—then I walked a little further up to the passenger car and I spoke to the passenger.
Q: Now, when you spoke to the passenger, what if anything did you say to the passenger in the car?
A: I believe it was, 'who is the owner of the car?' I

asked him in substance who owned the car, who is the owner of the car?

Q: And was there a response?

A: Yes. He told me he didn't speak any English. In other words, he didn't understand what I had asked him.

Q: All right. And what happened next?

A: I leaned into the car and I spoke to him again and again I got a negative answer, 'No speak English' and I looked around the car and I saw something on the floor of the car.

Q: All right. What was it that you saw on the floor of the car?

A: It was a metal object, appeared to be a pistol."

The officer further testified that he then opened the car door, reached in and pulled out the object, which turned out to be a pistol.

The officer's testimony on cross examination is consistent in this respect with his testimony on direct. Thus, he pursued no further inquiry respecting the difference in names between the New York driver's license and the New Jersey registration, albeit the defendant advised him (which turned out to be the truth) that he used both names, the name Vasquez being his mother's maiden name.

It is plain that the officer made no real effort to ascertain whether the driver and owner were the same person or whether the vehicle had been stolen. There was no check on any stolen vehicle list in the rmp, no inquiry in the usual manner of the precinct as to whether the vehicle had been reported as stolen. His sole action in this respect was to go to the door of the car and inquire of the passenger as to the car's ownership. At the same time he leaned into the car and made an eye search, which revealed the presence of the gun.

Assuming the credibility of the officer's testimony that he went to the car door to inquire of the passenger as to the ownership of the vehicle, the officer concededly did more. He "leaned into the car and *** looked around the car and I saw something on the floor of the car." The "something" turned out to be a gun. This was a search which was unreasonable. The act of leaning inside and conducting a visual search of the interior of the car was without lawful justification. There was no evidence of any danger to the police officers, nor was any such claim made to justify such intrusion (*People v. Vidal,* 71 AD2d 962). As the officer admitted, this kind of inquiry of the passenger as to the car's ownership was not a usual procedure.

The police stop of the vehicle and the requirement that the driver produce his license to drive and the registration as to ownership of the vehicle were perfectly proper in the light of the dangling New Jersey license plate attached only by a rope (*Delaware v. Prouse,* 440 U.S. 648, 653; *People v. Ingle,* 36 NY2d 413, 420). Moreover, further inquiry was appropriate in view of the discrepancy between the names on the driver's license and the registration, including, perhaps, the right to make an innocuous inquiry of the passenger as to his knowledge of the ownership of the vehicle.

The relevance or function of the inquiry of the passenger does not appear. Nowhere in the record is it suggested that the officer would have felt bound or satisfied if the passenger responded that Vasquez was indeed the owner of the vehicle. No: would an answer that Vasquez was not the owner be determinative. In short, any answer by the passenger would not be dispositive.

Even assuming that the inquiry was appropriate and

would serve a useful purpose, this did not include the right to make a search of the vehicle, which, in effect occurred when Officer Herlihy, in conjunction with his questioning of the passenger "leaned into the car and *** looked around", thus bringing into view the metal object beneath the passenger's feet.

It cannot be gainsaid that an officer has the right, when he approaches an individual seated in an automobile, to take such steps as appear necessary to protect himself against possible danger, even to the extent of opening the car door and asking the driver to get out (*Pennsylvania v. Mimms,* 414 U.S. 106; *People v. David L.,* 56 NY2d 698). However, there is no evidence in this case and no claim is asserted that the officer was in any danger, or felt himself to be in danger.

Instructive is *People v. Class,* __ NY2d __, NYLJ 12/3/84, P. 1, col. 6, where the police officer checking for the vehicle identification number (VIN) reached into the stopped car and moved papers on the dashboard to enable him to view the VIN. In so doing, he saw the handle of a gun protruding from underneath the seat. He seized it and then arrested the defendant-driver who had previously emerged from the vehicle at the officer's instructions.

As stated by the Court of Appeals, at NY2d :

> "The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy (United States v. Chadwick, 433 US 1, 7; see, also, Katz v. United States, 389 US 347; People v. Perel, 34 NY 2d 462, 466). One has no legitimate expectation of privacy in locations in a car which are observable by passersby. Accordingly, an officer's simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this

activity (Texas v. Brown, __ US __, 103 S Ct 1535; People v. Cruz, 34 NY 2d 362, 370). But there are many places inside a car—including the area underneath the seats—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The government intrusion here, Officer McNamee's opening the door and reaching inside, was undertaken to obtain information and it exposed these hidden areas. It therefore constituted a search (cf United States v. Place, US , 100 S Ct 2637; People v. Miller, 48 NY 2d 789, affg 52 Ad 2d 425, 428; People v. Sullivan, 29 NY 2d 69)."

As *Class* notes, §401 of the Vehicle & Traffic Law authorizes an officer to demand information necessary to identify the car, including a demand for the certificate of registration for the vehicle, something different than putting his head inside the car and making a visual search as in *Class,* and in our case. The fact that in *Class* the officer looked inside the vehicle to check the VIN and that in our case the officer looked around while he was questioning the passenger does not alter the fact that in each case there was a search without probable cause. As noted in *Class,* at __ NY2d__: "The facts reveal no basis for the officer to suspect other criminal activity or to act to protect his own safety (compare *People v. David L.,* 56 NY2d 698, cert den 459 U.S. 866). The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which standing alone, did not justify the search (cf. *People v. Marsh,* 20 NY2d 98)."

In each case the level of intrusion depends upon the circumstances which provide the predicate for the intrusion. Thus, in *Mimms,* relied upon by the majority, the automobile was being operated with expired license plates. It was stopped by the police for issuance of a traffic summons. The driver was ordered to step out and requested to produce the ownership card and operator's license. It was

while the driver was stepping out of the vehicle that the police noticed the bulge which caused them to frisk the driver, revealing a .38 caliber revolver. Thus, *Mimms* dealt only with the driver and passed only on the right of the police to order the driver out of the vehicle while they were conducting their inquiry as to the ownership of the vehicle and existence of a driver's license. This has nothing to do with a search of the interior of the vehicle, nor does it speak to the alleged right, asserted by the majority, to order a passenger out of the vehicle where the basis of the inquiry is solely the right of the driver to operate the vehicle. As *Mimms* emphasizes, in each case the level of intrusion must be measured by the circumstances which provide a basis for the intrusion. The test is reasonableness. There was no search of the vehicle, visual or otherwise, in *Mimms.* Moreover, in our case the driver was already voluntarily out of the vehicle.

The intrusion here consisted, in effect, of a search of the interior of the vehicle, albeit visual. Under the circumstances, the search violated the rights of the owner and driver of the vehicle.

We are not concerned with the rights of Cabollaro, the passenger. Thus, *David L., supra,* relied upon by the People, is not in point. In that case, as here, the stop was found to be lawful. After the driver of the vehicle emerged to talk to the police, one of the other police officers went to the passenger side of the car and opened the door, whereupon the passenger rolled over toward the middle of the front seat causing his shirt to move up, revealing a gun in his waistband. The Appellate Division dissenters, whose opinion was adopted by the Court of Appeals, properly observed that the passenger had "no possessory rights *** in the car" and hence no right of privacy protecting himself against such police intrusion and that his own movement revealed the contraband.

The majority suggest that *David L., supra,* establishes the right of the police to open the door of a car, lawfully stopped by them, to decrease the risk of injury to themselves. As we have noted, nowhere in the testimony in this case is there any suggestion that the police inquiry of the passenger related in any way to protecting the police from danger.

We are not here concerned with the right of the police to open the car door even on the passenger side in order to protect themselves against danger or injury. That was the given reason for opening the car door in *David L.,* as noted in *Class, supra.* What followed was an observation of a gun on the person of the passenger when he rolled over as a consequence of the police opening the car door. The issue there related to the rights of the passenger. No such problem here exists.

Here, we deal with the rights of the owner and driver of the vehicle. The right of privacy and the right to be protected against unreasonable intrusion are the very essence of the Fourth Amendment. Even assuming that the officer's inquiry of the passenger as to the ownership of the vehicle was reasonable, this did not include the right to search the vehicle. The owner had a continuing and sufficient personal interest in the interior of the vehicle in which he could legitimately expect his right of privacy to be protected against unreasonable search and seizure under the Fourth Amendment (*Rakas v. Illinois,* 439 U.S. 128). The passenger's right to privacy in the vehicle was substantially less than that of the owner and driver, as *David L., supra,* recognizes.

Nor does *People v. Rosario,* 94 AD2d 329, support the search made here. In that case the issue was the right of the police to require the occupants of the vehicle stopped

at gunpoint to emerge from the car. However, the circumstances in *Rosario* shed no light on our problem. In that case, as stated at 94 AD2d 332:

> "The officers received and were entitled to rely upon the radio report of a burglary in progress at the florist shop (cf. People v. Lypka, 36 NY2d 210). Several minutes thereafter, the police reached the scene in their marked police car and observed a car, without its lights on, pull out at a high rate of speed from a closed gas station about two doors down from the florist.
>
> Under these circumstances, the police possessed reasonable suspicion that the car's occupants were involved in criminal activity, i.e., the burglary at the florist shop, and therefore had an adequate basis to stop the car and investigate further (see People v. Lathigee, 84 AD2d 918).

In that case there was no mere traffic violation, there was a burglary. Moreover, the police were able to observe through the windows of the car, flowers and other items clearly indicative of participation in the reported burglary. No such circumstance exists here.

Equally distinguishable is *People v. Livigni,* 88 AD2d 386, aff'd 58 NY2d 894, where the officer, observing a parked car lacking a front license plate, requested the driver to produce his license and registration. At that point, from outside the car, the officer observed an empty gun holster on the front seat between the driver and the passenger who was sitting in the front right passenger seat. The two officers then drew their guns and ordered both passenger and driver out of the car. As the passenger exited the vehicle, one of the officers noticed a gun on the front seat where the passenger had been sitting. The right to stop the vehicle was plain, in view of the missing license plate. The order to exit the vehicle was a minimal intrusion warranted by the officer's observation of the holster. The

presence of the empty holster and the readily available inference that a gun was not far away gave the officers grounds to order the occupants out of the car. Plainly there was a risk involving the officers' safety which could have come from action by either the driver or the passenger.

This is a far cry from our case, where no one was ordered out of the car and the observation of the gun was only after the officer intruded into the car space and conducted a visual search.

There is no basis in the decided cases for concluding that a visual search of the interior of a car is warranted under circumstances where no danger is apparent, and where the behavior of the passenger is innocuous and the sole evidence of criminality is the alleged violation of a traffic ordinance or regulation. This is the teaching of *Class, supra.*

The basic principle with which we deal is the Fourth Amendment preclusion against unreasonable searches and seizures. The automobile exception, albeit necessary in the light of the mobility of such vehicles, should not be permitted to swallow the amendment in the guise of protecting the police in the absence of any evidence in the record that there was any danger to the police or that they felt themselves in any danger.

Taken at best, Officer Herlihy's intrusion into the vehicle, to pursue an inquiry which was relatively pointless, did not warrant his looking around the inside of the automobile, a search palpably unrelated to the inquiry or its purpose. The issue is not whether he should have closed his eyes. It is rather whether he should have made an unwarranted search.

In essence, the question before us is whether the officer's conduct in leaning into the vehicle and looking around the inside constituted a search, and if so, whether there was a legal predicate for such search. It is not disputed that a threshold inquiry to ascertain from the passenger the name of the owner of the vehicle was lawful. However, this does not encompass intrusion into an area where the defendant owner and driver had a legitimate expectation of privacy. Under the circumstances here involved, the defendant had a reasonable expectation of privacy with respect to the interior of the vehicle from which he had emerged.

The sole evidence of any violation of law consisted in the dangling license plate and the fact that the names on the driver's license and the registration for the vehicle produced by the driver did not coincide. If there was some evidence, not here shown, of illegal activity within the vehicle, or if, indeed, there was some evidence, not here asserted, of possible danger to the officer, the visual inspection of the interior of the vehicle might have constituted a lawful search.

It is plain that a motor vehicle is generally afforded a lesser degree of Fourth Amendment protection than is other property. However, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." (*Coolidge v. New Hampshire,* 403 U.S. 443, 461-462.)

There is a legitimate expectation of privacy in the interior of a motor vehicle, however diminished. Such an expectation clearly exists in those areas which would otherwise be free from observation except by physical intrusion of some nature. The intrusion here involved was not supported by probable cause. The officer's conduct here is so

markedly different from that usually found where there is suspicion of a stolen vehicle that it is difficult to credit the theory that his inquiry of the passenger was solely concerned with determining the name of the owner. The officer was plainly conducting a search. (*Commonwealth v. Podgurski,* 386 Mass 385, 436 N.E.2d 150, cert den *sub nom. Massachussetts v. Podgurski,* __U.S.__, 103 S. Ct. 1167.)

The dangling license plate may have provided an articulable basis for approaching defendant and asking to see his license and registration. However, there was no justification for leaning into the vehicle and looking around, thus conducting a visual search of its interior (*Class,* supra; *Vidal,* supra). As in those cases, there was no evidence or reason to believe the officer was in physical danger. (*People v. Young,* 81 AD2d 843, 844, app. dsmd. 54 NY2d 1027).

By putting his head inside the car door and conducting a visual search, the police officer here plainly intruded into the owner-driver's "personal security" (*Terry v. Ohio,* 392 U.S. 1, 19). There was an insufficient articulable suspicion to justify such intrusion.

There should be a reversal, the motion to suppress should be granted and the indictment dismissed.

Order filed.

APPENDIX C—OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, MR. JUSTICE KATZ, SUPPRESSION HEARING

THE COURT: Okay, Counselors and Mr. Vasquez, I reviewed my notes and applicable law and the following is my determination. An indictment number 514 of '82 has been filed against the defendant, Luis Vasquez, charging him with two counts of criminal possession of a weapon in the third degree a class D felony. Mr. Vasquez claiming to be aggrieved by an unlawful search and seizure made without probable cause has moved herein to suppress the two pistols and the ammunition seized from his automobile. When a defendant such as Mr. Vasquez challenges the admissibility of physical evidence and makes a motion to suppress he bears the ultimate burden of proving that the evidence should not be used against him. The People have only the burden of going forward to show the legality of the police conduct in the first instance. A pretrial suppression 1983. One witness was called by the People, Police Officer Dennis Herlihy. The witness was frank, candid and trustworthy. His testimony, marked by no serious inconsistency or contradictions had the force and flavor of credibility and believability. Based upon the evidence adduced at the pretrial suppression hearing I make the following findings of fact.

On September 28, 1981 Police Officers Gorman and Herlihy were in uniform working what is called an eight to four shift in a marked RMP car. At about 11:30 a.m. they were proceeding northbound on Broadway at about 183rd Street when they noticed a car proceeding southbound with a New Jersey license plate haning from what appeared to be a string in front of the car. That automobile stopped between a hundred eighty-third and a hundred eighty-fourth Street and the driver, Mr. Vasquez, double parked and exited the vehicle. Police Officer Herlihy made

a U turn, exited his rmp and approached the defendant, Mr. Vasquez, the driver of the vehicle. Officer Herlihy asked Mr. Vasquez for his license and registration. Mr. Vasquez produced a New York State driver's license bearing the name Vasquez and the address 204 West 108 Street here in New York County and a certificate of registration bearing the name Conrad Pons and an address of 709 Sip Street, Union City, New Jersey. When Officer Herlihy inquired as to who the owner of the vehicle was Mr. Vasquez responded that it was his car. Officer Herlihy then approached the car and asked Mario Cabalarro who was seated in the front passenger seat, whose car it was. Mr. Cabalarro responded that he did not speak English. Officer Herlihy then leaned into the car through an open window and repeated the question and while leaning into the car he noticed a metallic object which appeared to be a pistol on the floor of the car between Mr. Cabalarro's feet. Officer Herlihy opened the car door and pulled that object out. That object was in fact a hand gun. People's exhibit two. Officer Herlihy then took Mr. Cabalarro and Mr. Vasquez into custody and Officer Gorman drove Mr. Vasquez's car back to 34th Street Precinct Station. Gorman drove the defendant's car up to the station house—strike that. And at the precinct Officer Herlihy searched the automobile owned by Mr. Vasquez and found another loaded gun, People's exhibit three in a brown paper bag behind the front passenger's seat.

I make the following conclusions of law. The initial stop and inquiry of Mr. Vasquez was based upon a reasonable suspicion that the automobile might be stolen. The license plate, front license plate was not bottled on to the car and was hanging from a string a method of fixture common to solen cars. In addition, the hanging plate and the double parking of the vehicle were both violations of the Vehicle and Traffic Law that would require police ac-

tion. When the defendant, Mr. Vasquez, produced a license and a registration, bearing different names and addresses and told the officer that he, the driver, owned the car, Police Officer Herlihy's suspicion were further raised. Clearly, this gave rise to sufficient cause to make further inquiry of Mr. Cabalarro, the passenger in the vehicle. People v. Sobotker, 43 NY 2d, 559, that reasonable suspicion is the quantum of knowledge sufficient to induce an ordinary prudent and cautious activity at end. The first object recovered, People's exhibit 2, was in open view on the floor of the car and appeared to be a pistol. Under the circumstances Officer Herlihy's opening of the car door and his reaching in to retrieve the object was a minimal intrusion reasonable in every respect. The recovery of the second pistol, People's exhibit three was made pursuant to an inventory search incident to arrest. That search was especially reasonable in view of the fact that the car had two occupants and one weapon had already been recovered. The question of probable cause is a mixed question of law and fact. The truth in existence of the facts and circumstances bearing on the issue being a question of fact and the determination as to whether the facts and circumstances found to exist and to be true constitute probable cause being the question of law. In the instant case clearly, the seizure of the physical evidence, namely, the two pistols and ammunition was legal and proper under the circumstances.

Accordingly, Mr. Vasquez' motion to suppress physical evidence is in all respects denied.

The aforesaid constitutes the decision, order

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: FRANCIS T. MURPHY
Presiding Justice of the Appellate Division

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

LOUIS VASQUEZ,

Defendant-Appellant.

M-292
ORDER GRANTING LEAVE
Order No. 20509

I, Francis T. Murphy, Presiding Justice of the Appellate Division, Supreme Court, First Department, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above-named appellant to appeal to the Court of Appeals.

Dated: New York, N.Y.
February 19, 1985

s/ Francis T. Murphy
Justice of the Appellate Division

*Description of Order: Date 4/26/83, Sup.Ct.N.Y.Co., App. Div. 1st 12/20/84

APPENDIX D—EXCERPTS FROM THE CONSTITUTION OF THE UNITED STATES

Fourth Amendment

Search and Arrest Warrants

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.